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## Contracts and Sales

Joseph Curtis

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## *VIRGINIA SECTION*

# THE ANNUAL SURVEY OF VIRGINIA LAW

### CONTRACTS AND SALES

*Joseph Curtis\**

The courts in Virginia, federal and state, passed upon an average number of contracts and sales issues during the period covered by this Survey. A surprising number were not of the recurring variety, determinations of which serve primarily as reassertions of the state of the law, but presented somewhat unique problems either in their facts or in the law for the courts to resolve. Intriguing questions such as the enforceability of an option to buy at an unspecified price if a seller should decide to sell, whether a failure to obtain a building permit upon informal inquiry constitutes impossibility, and when does a formally executed instrument which was not intended to be binding become so by complying with its terms, were presented for determination. Others, perhaps less troublesome in the law involved, were nevertheless of interest in their unusual fact settings, such as a sister's receiving funds to pass on to the other woman in her brother's life from both her deceased brother and his surviving wife. It is a case in the field of sales, however, which may prove to be of the greatest significance in the development of Virginia law, nudging the state a little closer to the Sales Act adherents.

In greater detail, the following are the matters which the courts considered.

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\* Professor of Law, William and Mary. Member, New York and Virginia Bars. B.S., 1934, LL.B., 1937, LL.M., 1948, New York University.

### A. Seller's Irritation Not Appeased at Broker's Expense

A seller's arbitrary refusal to consummate a sale of his property will not defeat the broker's right to commissions if the latter has produced a purchaser who is ready, able and willing to buy upon terms which the seller has agreed upon. This result is usually reached even where the broker's employment is "to effect a sale" and not just "to procure a purchaser."<sup>1</sup>

In *Hawthorne v. Hannowell*<sup>2</sup> the seller was displeased that advance word of the prospective deal had been given out, suspecting the intended female escrow agent of having made the disclosure. He rejected the broker's suggestion, made to pacify him and save the deal, that another be substituted as escrow agent and refused to go through with the sale. While the reason for the seller's refusal was disputed, the seller contending that his price was not met, the Court found the evidence sufficient to support the lower court's finding that the purchaser was willing to buy on the seller's terms. The Court conceded that the commissions of a real estate broker are contingent and acknowledged that in addition to producing a willing purchaser the broker must also show "that the sale was not concluded by reason of some fault or misrepresentation of the seller."<sup>3</sup> If the seller's irritation is to justify his refusal, apparently it should be attributable to some matter more commonplace than feminine communicativeness, at least in so far as he may expect his broker to pay for appeasing it. The proposition of law that a consummation of the sale is not a condition precedent to the broker's right to his commission is here observed,<sup>4</sup> and as to the factual aspects of the case, a seller, irritated by the premature disclosures of a third party, may have to pay a broker's commission to satisfy his spite.

### B. Broker's Purchaser Willing and Able, But Not Ready To Buy

Real estate brokers had more than their constitutional day in court before the Supreme Court of Appeals during the 1960-1961 Term, but the second day proved to be not so auspicious for the profession. The question of whether a broker earns his commission when he produces a purchaser who introduces conditions to his meeting the seller's terms, was presented to the Court in *Rotella v. Lange*.<sup>5</sup> The purchaser was willing to

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1. See Annot., 169 A.L.R. 605, 607 (1947).

2. 202 Va. 70, 115 S.E.2d 889 (1960).

3. *Id.* at 76, 115 S.E.2d at 893, quoting *Bear v. Parrish*, 148 Va. 754, 760, 139 S.E. 488, 489 (1927).

4. The Court cited and followed *Massie v. Firmstone*, 134 Va. 450, 114 S.E. 652 (1922), and *Snider v. New River Ins. & Realty Corp.*, 187 Va. 548, 47 S.E.2d 398 (1948).

5. 202 Va. 575, 118 S.E.2d 516 (1961).

buy the defendant's restaurant business for the price and upon the terms set forth by the defendant if he could obtain an A.B.C. license, a health permit, and a five year lease of the property upon which it was conducted, the current lease having less than three years to run. The Court viewed the proffered conditions as constituting a counteroffer and reversed the judgment, which had been in the broker's favor. The opinion reflects that whether such a response to an offer be termed a conditional acceptance or a counteroffer, it constitutes, in legal effect, a rejection of the original offer. More specifically, as pertinent to the requirements of a broker's right to a commission, the right is contingent not only on his purchaser being able and willing to buy on the seller's terms, but also on his readiness to do so.

Also significant in the case is the Court's disposition of the issue, raised by the broker, that because the defendant had received two prior offers from the prospect, similarly conditioned but offering less than seller was asking, and seller had expressed objection only as to the price and not as to the conditions, seller's agreement to the conditions should be implied. Seller was thereby estopped, contends the broker, to assert thereafter these imposed conditions as a nonacceptance of his terms. Excepting the case of tender of a certified check in lieu of cash, there is no waiver of a proper ground for rejection by failure expressly to assert it.<sup>6</sup> This principle is applied, not only where the one who rejects offers no reason for doing so, but as well where he asserts an improper one and fails to mention the justifiable grounds.<sup>7</sup> All the more so is this the rule where he asserts one of two proper grounds and, for whatever reason, fails to mention the other. The Supreme Court of Appeals allotted few words to instruct that this principle is equally applicable to the rejection of a broker's proffered purchaser.

### C. *Circumstances Not Warranting Implied Condition*

Virginia Code section 11-23<sup>8</sup> requires that the performance bond of a general contractor be conditioned upon the payment to all persons performing labor and furnishing materials in the prosecution of work upon a public building and gives to such laborers and materialmen a direct right of action against the obligor and sureties on the bond.<sup>9</sup>

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6. The exception made as to payment by check is based upon commercial custom. See RESTATEMENT, CONTRACTS § 305 (1932).

7. Of course, if his failure to mention the proper ground is accompanied by conduct tending to mislead the other party in that respect, he may thereby be estopped. See *List & Son Co. v. Chase*, 80 Ohio St. 42, 88 N.E. 120 (1909).

8. VA. CODE ANN. § 11-23 (Supp. 1960).

9. Where the discharge of a performance bond is expressly conditioned upon payment to materialmen, the latter's direct right of action against the surety is generally

In order to enable the plumbing subcontractor to obtain materials and supplies on credit, the general contractor agreed to make the monthly checks for the amounts to become due subcontractor payable jointly to him and the supplying company. Supply retained only so much of the proceeds of each monthly check as amounted to the current balance of Subcontractor's running account, and remitted the excess to Subcontractor. It was held in *Paulson v. Hajoca Corp.*<sup>10</sup> that, absent Supply's promise to do so, Supply was under no obligation to retain the full amount of each check until the completion of Subcontractor's work in order to hold General Contractor and his surety on the performance bond for the amount of Subcontractor's indebtedness arising subsequent to the issuance of the last joint check. The Court found the evidence insufficient to support any express condition to that effect, and that no such condition should be implied merely from Supply's insistence and General Contractor's consent that Supply be made a joint payee of the monthly installment checks. Especially such an implication was not warranted in view of the fact that both Supply and General Contractor understood that Subcontractor had little capital and would need some of the proceeds of each payment check with which to pay other suppliers with whom he was dealing and thereby remain in business. Supply's judgment against the General Contractor and Surety was affirmed.

#### D. *Equity and Good Conscience Prevail*

If its facts should be taken for dramatic adaptation, *Furr v. Arnold*<sup>11</sup> might be entitled "The Case of the Cleaner Hands," and it has a better plot than most shows.

Husband borrowed 5,000 dollars and deposited it in a joint checking account with Wife. About to undergo a surgical operation, he gave his sister a check for 3,500 dollars with the understanding that if he should not survive she was to retain 1,500 dollars and give the balance of 2,000 dollars to a lady friend, well known to Sister but not to Wife. He did not survive. Sister thereupon deposited the check in her own account and issued a check thereon for 2,000 dollars to Friend. However the ointment had been prepared by Husband having informed Wife that he wished Sister to have 3,500 dollars in the event of his death. The fly flew into it when, after Husband's death, Wife, possibly far more obliging than she supposed, wrote a check upon the same account for 3,500 dollars and

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upheld on the third party beneficiary concept, even in the absence of statute and irrespective of whether the contract is a public one. See 2 WILLISTON, CONTRACTS § 372 (3d ed. 1959).

10. 202 Va. 447, 117 S.E.2d 692 (1961).

11. 202 Va. 684, 119 S.E.2d 242 (1961).

exchanged it for a bank cashier's check, which was then presented to Sister with the explanation that her brother desired that she should have it. Wife's check cleared before Sister's deposited check, resulting in the dishonor of the latter and, in sequence, Sister's check to Friend, for insufficient funds.

Sister rejected Friend's claim to make good the 2,000 dollar check, contending that her brother intended that she should have 5,000 dollars in all, and that there was a failure of consideration for 2,000 of the 3,500 dollars that she was to have given Friend. There was, concludes the Court on this evidence, but one fund out of which it was intended and agreed that Friend was to receive 2,000 dollars, and by whatever means this fund came into Sister's hands, Husband's check or cashier's check, in equity and good conscience 2,000 dollars of it was Friend's. Another exception to the requirement of consideration is here acknowledged. Equity and good conscience proved to be as effective a reply to the defense of failure of consideration as is "action in reliance"<sup>12</sup> to that of no consideration.

#### E. *No Specific Enforcement Without Ascertainment of All Essential Terms*

A specifically enforceable contract must be complete and certain in all of its essential terms. Applying this principle in *Rolfs v. Mason*,<sup>13</sup> the Supreme Court of Appeals affirmed the lower court's refusal to decree specific performance of an owner's promise that if he should decide to sell his property, he would give the promisee "first choice." The Court agreed that such a provision neither fixes the price, an essential term, nor provides any way for ascertaining it with certainty.

In a previous Virginia case, however, where the promisee learned of promisor's willingness to sell the property at a certain price and then informed the latter that he wished to exercise his right to buy it at that price, specific performance was granted when subsequently the promisor sold it to another.<sup>14</sup> But there the provision recited that the promisee was to have the first privilege of buying "on terms to be agreed upon at the time such agreement is made," and the Court determined that the seller's undisputed willingness to sell, together with the promisee's manifested willingness to buy, at the price for which the property was sold to the third party thereby fixed the price in the mode prescribed by the contract. In the *Rolfs* case, the provision went no further than to state that if the promisors "should sell . . . they shall give . . . [the promisees] first choice." The Court's opinion distinguished this wording from that of the one previously quoted and follows precedents of other jurisdictions holding

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12. See RESTATEMENT, CONTRACTS § 90 (1932).

13. 202 Va. 690, 119 S.E.2d 238 (1961).

14. *Parker v. Murphy*, 152 Va. 173, 146 S.E. 254 (1929).

that a "first opportunity" option which does not provide a means for determining the price cannot be specifically enforced.<sup>15</sup>

While the holding has considerable support in case precedent, it seems somewhat strange that the courts have not been willing to imply that the option price, if the option should become exercisable through the promisor's readiness to sell, was to be whatever price for which the promisor was willing to sell to any other. That such was the intention of the parties seems irresistible, and the courts have not been hesitant to determine an agreed price by implication in other situations in which the apparent intent of the parties justified it.<sup>16</sup>

#### F. *Impossibility Must Be Founded on More Than Superficial Effort*

Supervening illegality of a promised performance is generally acknowledged to be such impossibility as will excuse a promisor's duty to render it. A change in the zoning regulations which would thereupon prevent a contractor from constructing the type of building specified by the contract relieves him from his obligation to do so.<sup>17</sup>

In *Pennsylvania State Shopping Plazas, Inc. v. Olive*,<sup>18</sup> the new zoning law permitted a variance in the regulations and allowed the planning commission some discretion in the granting of building permits for the use contemplated by the contract. Defendants' attorney discussed with the county planning director and the planning commission the possibility of obtaining a use permit to erect a gasoline service station which defendants had agreed to construct and lease to plaintiff as part of the consideration for the sale to them of plaintiff's land. He was advised that no such permit could be issued for the area dimensions set forth in the contract, and this informal determination was contended by defendants to meet the requirements of an impossibility of performance defense to plaintiff's suit for damages. Mr. Justice F'Anson pointed out that the attorney, when con-

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15. *Machesky v. City of Milwaukee*, 253 N.W. 169 (Wis. 1934); *Wolf v. Lodge*, 159 Iowa 162, 140 N.W. 429 (1913); *Folsom v. Harr*, 218 Ill. 369, 75 N.E. 987 (1905); *Fogg v. Price*, 145 Mass. 513, 14 N.E. 741 (1888); *Audreula v. Slovak Gymnastic Union*, 140 N.J. Eq. 171, 53 A.2d 191 (Ct. Err. & App. 1947).

16. The standard of reasonableness is frequently invoked in employment contracts and contracts for the sale of goods. See 1 WILLISTON, *CONTRACTS* § 41 (3d ed. 1957). "The court should be slow to come to . . . [the] conclusion [that an agreement is too indefinite as to price] if it is convinced that the parties themselves meant to make a 'contract' and to bind themselves to render a future performance." 1 CORBIN, *CONTRACTS* § 97 (1950). A lessee's option to buy land has been specifically enforced, although no price was named, the court finding the reasonable price by implication. *Shayeb v. Holland*, 321 Mass. 429, 73 N.E.2d 731 (1947).

17. See *Poledor v. Mayerfeld*, 94 Ind. App. 601, 176 N.E. 32 (1931); cf. *DiBiasio v. Ross*, 43 R.I. 78, 110 Atl. 415 (1920) (prevention of repairs by building inspector).

18. 202 Va. 862, 120 S.E.2d 372 (1961).

fronted with this informal response to his inquiry, did not sufficiently explore the possibilities of obtaining the necessary permit, or a discretionary variance in the zoning regulations, as he might have done by the filing of a formal application which would at least have reserved a right of appeal to the zoning board. The Court resolved that the burden of seeking to obtain the permit was upon the defendants and that their efforts in that respect were not expended with sufficient diligence. While impossibility need not, perhaps, be absolute in order to constitute a valid defense, it does at least connote that defendant's failure to perform was not attributable to his own eagerness to regard impediments as insurmountable barriers.

Another interesting issue in the case, and that part in which the lower court's decree was reversed, was the amount of damages allowable for defendant's breach of its duty to construct and lease the service station. The lower court had correctly instructed the jury that the damages for breach of a contract to lease real property were to be measured by the difference between the rent agreed upon and the rental value of the premises, and that they were not to consider the loss of anticipated profits from the business intended to be conducted on the premises. Plaintiff had injected some evidence of what he could expect his profits to be, and the Court found it apparent that the jury had considered this evidence in its determination of the rental value. The Court observed a distinction between the interruption of an established business and the prevention of a new one, holding that the anticipated profits of the latter are too speculative and should not have been considered by the jury in determining rental value.<sup>19</sup>

#### G. *When a Contract Which Is Not a Contract Becomes One*

Coal mine operator signed what purported to be a contract with the United Mine Workers, agreeing to pay to its Welfare and Retirement Fund forty cents for each ton of coal produced. He contended that the agreement was intended merely as a formality or "sham" to give an appearance of compliance with the National Bituminous Coal Wage Agreement, and that it was understood that he would actually have to pay only what he could.

In *Lewis v. Lowry*<sup>20</sup> the United States District Court for the Western District of Virginia granted the trustee of the fund summary judgment

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19. In this respect, occasionally a distinction is made between an industrial or manufacturing business and one which is professional or service rendering, classified as nonindustrial. See 15 AM. JUR. *Damages* § 134 (1938). The Court, in passing upon the issue, speaks of ascertaining the rental value of premises leased for a nonindustrial business. Generally, however, the crux is in the further distinction between a going business and a new one.

20. 190 F. Supp. 490 (W.D. Va. 1960).



for the difference between the amount which the operator did pay to the fund and the forty cents per ton called for by the written contract. The court determined that the evidence left no room to doubt that the mine operator had subsequently ratified the contract, even if it were to hold, which it did not, that the agreement was not effective upon execution. Ratification was found in the operator's having computed his payments to the fund on the forty cents per ton basis,<sup>21</sup> and also in his acceptance of the benefits of the provision, as his employee miners had been working his mines under the assumption, induced by his references in correspondence with their representatives, that the provision was in full force and effect. There was also a defense of duress, but the court found none.

Perhaps the more interesting legal question, at least one of greater general significance, is whether the parol evidence rule would preclude the defense of the alleged oral understanding, not offered to vary the terms of the written contract, but to show that the parties had no intent to enter into one. The court briefly alludes to it in a tone from which it might be inferred that, even without the finding of ratification, it would have held the defense untenable on the grounds that otherwise it "would open the door to varying solemn written contracts by prior oral agreements . . ." <sup>22</sup> Query, however, is not parol evidence always competent, at least in equity, to show the nonexistence of a contract?<sup>23</sup>

The same facts and issues are present in the companion case of *Lewis v. Premium Darby Coal Corp.*,<sup>24</sup> where summary judgment was granted plaintiff in accordance with *Lowry*.

#### H. *Indemnitee's Expenses in Defending Initial Claim*

In *General Elec. Co. v. Mason & Dixon Lines, Inc.*,<sup>25</sup> the same district court decided that reasonable attorneys' fees and other expenses incurred

21. It appears that while defendant did compute his payments at forty cents per ton, it is likely that he did so only for the record, the same reason for which he had executed the formal instrument, *i.e.*, to preserve appearances, and compensated for it by reporting less than the actual number of tons produced. If such were done with the knowledge of the plaintiffs, of which there is no indication in the court's opinion, it would seem that this conduct should no more constitute a ratification than would the execution of the instrument itself constitute a binding agreement.

22. *Lewis v. Lowry*, 190 F. Supp. 490, 492 (W.D. Va. 1960).

23. "If the [oral] evidence [that the writing signed by the parties was not intended as a contract] was inadmissible at law . . . it was certainly admissible in equity to prevent the accomplishment of what any court of chancery must consider and treat as fraud." *Michels v. Olmstead*, 157 U.S. 198, 201 (1895). See generally 20 AM. JUR. EVIDENCE § 1094 (1939).

24. 190 F. Supp. 493 (W.D. Va. 1960).

25. 186 F. Supp. 761 (W.D. Va. 1960).

by an indemnitee in defending a prior action against him by a third party, which resulted in the judgment for which he seeks indemnity, are a proper element of damages recoverable in his subsequent action against the indemnitor, as well as is the amount of the judgment itself. The general rule that attorneys' fees and other expenses of litigation are not recoverable in the absence of statute was observed by the court in denying recovery of such items incurred in prosecuting the action against the indemnitor. The opinion explores the texts<sup>26</sup> and case law<sup>27</sup> on the point of making an exception of the costs of defending the claim indemnified against and finds substantial uniformity supporting it, especially where the contract of indemnity is an express one. The court found no reason to reach a different result applicable to an implied contract, which was the case of the one before it.<sup>28</sup>

This exception to the general rule appears to be well justified in the light that the expenses of defending the claim of the third party are more so an integral part of the loss indemnified against than are the expenses of the suit against the indemnitor, to which the general rule applies, which are incurred in establishing the right to indemnity. The same distinction persists whether the duty of the indemnitor is imposed by law or by express agreement of the parties.

### I. *Warranty of Merchantability*

A significant and helpful concession has been made by the Supreme Court of Appeals in the matter of what warranties of quality may be implied in the sales of goods. An implied warranty of suitability for a particular purpose has long been acknowledged and applied by the Virginia courts.<sup>29</sup> One who sells goods, knowing of some special use that the buyer intends to make of them and that the latter is relying upon his superior judgment that the goods are suitable for such use, impliedly warrants that they are fit

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26. 42 C.J.S. *Indemnity* § 24 (1944); 27 AM. JUR. *Indemnity* § 27 (1940).

27. Cited and discussed are cases from the Second, Third, Fourth, Fifth and Sixth Circuits of the United States Courts of Appeals. The Virginia cases mentioned by the court are *Commonwealth Pub. Serv. Corp. v. Town of Bluefield*, 167 Va. 82, 187 S.E. 521 (1936), and *Hiss v. Friedberg*, 201 Va. 572, 112 S.E.2d 871 (1960), the latter especially impressive.

28. See Dillard, *Contracts and Sales, 1959-1960 Ann. Survey of Va. Law*, 46 VA. L. REV. 1626, 1633 (1960), for discussion and comment upon the technique used by the court to imply the indemnitor's duty to the indemnitee in the former case brought by the injured party against the indemnitee and in which the indemnitor was joined as third-party defendant.

29. See *E. I. duPont deNemours & Co. v. Universal Moulded Prods. Corp.*, 191 Va. 525, 62 S.E.2d 233 (1950); *Greenland Dev. Corp. v. Allied Heating Prods. Co.*, 184 Va. 588, 35 S.E.2d 801 (1945); *Universal Motor Co. v. Snow*, 149 Va. 690, 140 S.E. 653 (1927); *Standard Paint Co. v. E. K. Vietor & Co.*, 120 Va. 595, 91 S.E. 752 (1917); *Gerst v. Jones & Co.*, 73 Va. (32 Gratt.) 518 (1879).

for that purpose. The other warranty of quality that is frequently implied—that even though no intended special use of the goods is made known to the seller, he nevertheless warrants that the goods which he sells are reasonably fit for the purposes for which goods of that description are generally used—has not received the attention of the Virginia courts except in the matter of food for human consumption.<sup>30</sup>

Under the common law this warranty of merchantability was imputed only to a producer or manufacturer of the goods and not to a dealer in them. With the support of the Uniform Sales Act,<sup>31</sup> the modern view extends implication of the warranty to the dealer in most jurisdictions, even in some states in which the act has not been adopted.<sup>32</sup>

It is extraordinary that the Virginia courts should have remained uncommitted as to the existence in Virginia law of the implied warranty of merchantability. On many occasions the courts have implied a warranty that food could be consumed without harmful effects, but the *ratio decidendi* for the result has been either the implied warranty of suitability for a particular purpose or a *sui generis* warranty that food is fit for human consumption.

In *Smith v. Hensley*<sup>33</sup> the plaintiff, a dealer in a roof-coating product designed to reduce the permeation of heat, did not rely upon the skill and judgment of the defendant distributor as to the amount of lime to be added to the purchased concentrate in preparing the material for application, but followed the directions of the manufacturer. These directions proved to be faulty and resulted in the impairment of his customers' roofing. Affirming that there was a breach of warranty by the distributor despite

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30. The latest Virginia case concerned with the implied food warranty, *Swift & Co. v. Wells*, 201 Va. 213, 110 S.E.2d 203 (1959), extends it from the manufacturer to the consumer who purchased from the retailer, aligning Virginia with many other states which have eliminated the privity ordinarily required for breach of contract action. For extended discussion of this case, see Dillard, *Contracts and Sales, 1959-1960 Ann. Survey of Va. Law*, 46 VA. L. REV. 1626 (1960). See also Comment, *Implied Warranties in the Sale of Food*, 17 WASH. & LEE L. REV. 167 (1960).

31. UNIFORM SALES ACT § 15 (2).

32. This result is somewhat attributable to the almost coterminous areas of the implied warranty in sales by description, that the merchandise sold measures up to the agreed description by which the subject goods are identified, and the implied warranty of merchantability, that the goods sold are of reasonably merchantable quality for goods of that nature. The former is implied at common law, whereas the latter is not, at least not for imposition upon the dealer with respect to latent defects. The line to be drawn between them, if one can be, is at whatever point the designation of the goods can be regarded as a description. Does a product sold as roof coating meet that description if you cannot coat roofs with it, at least harmlessly? Is a bed a bed if it cannot be slept in? The distinction between a warranty of description and one of merchantability in these matters is truly academic.

33. 202 Va. 700, 119 S.E.2d 332 (1961).

the dealer's nonreliance in this respect, Mr. Justice P'Anson holds that a roof-coating material, although sold by its brand name, must at least be of such quality as not to cause damage to the roofs on which it is used. In explicit language he finds that there is an implied warranty that a product is fit for the general purposes for which it is sold. The opinion seems to stress that the roof-coating material was purchased by its brand name and that this was essential for the warranty implication. However, the reference authority which the Court cites with approval and from which it quotes includes sales by description and appears to encompass the whole of the area in which the warranty of merchantability would ordinarily be implied in Sales Act states.

It is inconceivable that one who buys a bed from a furniture dealer and comes out with something that cannot be slept in, should have no redress against the dealer unless either the dealer expressly stated that he could sleep in it or he made known to the dealer that he intended to do so.<sup>34</sup> It is reassuring to know that such is not the state of the law in Virginia.

#### J. *Damages Measured by Cost of Used Car*

In *Gertler v. Bowling*,<sup>35</sup> the Supreme Court of Appeals held that an owner's original cost less depreciation is an acceptable measure of damages for a car rendered worthless in the breach of a bailee's duty, as well in the case of a used car as in that of a new one.

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34. Such as the folding bed of the casebook popular *White v. Oakes*, 88 Me. 367, 34 Atl. 175 (1896), which closed like a jackknife whenever laid upon. The Maine Supreme Judicial Court, adhering to common law, preferred the senile caveat emptor to implying a warranty of the dealer that the bed could be slept in other than doubled up inside of it.

35. 202 Va. 213, 116 S.E.2d 268 (1960).